

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee  
Hon. Kathryn Doi Todd, Chair  
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DATE: August 8, 2006

SUBJECT: Appellate Procedure: Record on Appeal in Unlimited Civil Cases (amend Cal. Rules of Court, rules 8.120, 8.124, 8.130, 8.155, 8.160, and 8.224) (Action Required)<sup>1</sup>

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Issue Statement

Some of the rules concerning the record on appeal in unlimited civil cases are confusing or unclear about certain details of these procedures: (1) rules 8.120 and 8.124 provide that exhibits are deemed to be part of the clerk's transcript or appendix, respectively. These rules also provide, however, that exhibits are not actually included in the clerk's transcript or appendix unless the appellant designates or includes them. Litigants may therefore be confused about whether exhibits are included in a clerk's transcript or appendix; (2) rule 8.124 does not indicate whether exhibits lodged with the trial court are deemed part of an appendix; (3) rule 8.224 does not specify how its procedure for transmitting original exhibits to the reviewing court interacts with the procedure for including exhibits in the clerk's transcript under rule 8.120 or an appendix under rule 8.124; (4) rules 8.130 and 8.155 do not specify who is responsible for the cost of a reporter's transcript ordered by the court to augment the record; (5) rule 8.130 authorizes a party to request a computer-readable reporter's transcript, but does not address the how such a transcript should be labeled or formatted; and (6) the heading of rule 8.160(g) does not fully reflect the text of that provision.

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<sup>1</sup> At the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Under the reorganization, the appellate rules that were numbered 1 et seq. have been renumbered as rules 8.1 et seq., and new format conventions have been adopted. Hence, the rule amendments are shown throughout this proposal using the new rule numbers that will become effective January 1, 2007. The rules in this proposal were renumbered as follows: rule 8.120 is former rule 5; rule 8.124 is former rule 5.1; rule 8.130 is former rule 4; rule 8.155 is former rule 12; rule 8.160 is former rule 12.5; and rule 8.224 is former rule 18.

## Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2007:

1. Amend rule 8.120 to provide that exhibits are deemed to be part of the “record” rather than part of the clerk’s transcript;
2. Amend rule 8.124 to clarify that exhibits lodged with the trial court, along with exhibits admitted or refused, are deemed part of the record on appeal;
3. Amend rules 8.130 and 8.155 to clarify that the appellant is generally responsible for the cost of a reporter’s transcript ordered by the court to augment the record, and also amend rule 8.130 to clarify that a computer-readable copy of a reporter’s transcript must comply with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271(b);
4. Amend the heading of rule 8.160(g) to conform it more closely with the text of that provision; and
5. Amend rule 8.224 to clarify that the procedure for transmitting original exhibits to the reviewing court only applies to exhibits that were not included in the clerk’s transcript under rule 8.120 or in an appendix under rule 8.124.

The text of the amended rules is attached at pages 6–8.

## Rationale for Recommendation

### *Exhibits*

The rules relating to appeals in unlimited civil cases currently contain several different provisions that address inclusion of exhibits in the record on appeal.

Rule 8.120 addresses the designation and preparation of clerk’s transcripts for appeals in unlimited civil cases. Subdivision (a)(5) of this rule provides that the clerk’s transcript is “deemed” to include “all exhibits admitted in evidence, refused, or lodged” with the trial court, but a party wanting an exhibit copied in the transcript must specify that exhibit in its notice designating the clerk’s transcript. Subdivision (b)(3), in turn, provides that, if designated by a party, the clerk’s transcript must contain any exhibit “admitted in evidence, refused, or lodged.” Some litigants may find it confusing that exhibits are deemed included in the clerk’s transcript even though they do not actually appear in this document unless they are designated by a party.

Rule 8.124 establishes a procedure for using a compilation of documents prepared by the appellant, called an “appendix,” instead of a clerk’s transcript. Subdivision (b)(1) of rule 8.124 requires that such an appendix contain any item required to be included in the clerk’s transcript under rule 8.120(b)(1) and any item that may be included in the clerk’s

transcript under rule 8.120(b)(3) that is necessary for proper consideration of the issues. Since, as noted above, rule 8.120(b)(3) permits “any exhibit admitted in evidence, refused, or lodged” to be included in the clerk’s transcript, these items may also be included in an appendix. Subdivision (b)(5) of rule 8.124 also addresses exhibits, however. This subdivision provides that the appendix is “deemed” to include all exhibits “admitted in evidence or refused,” whether or not the appendix actually contains copies of these exhibits. As with rule 8.120, some litigants may find it confusing that exhibits are deemed included in the appendix even though they do not actually appear in this document unless they are included by a party. In addition, unlike the provision governing clerk’s transcripts under rule 8.120, this rule does not deem exhibits that are “lodged” with the trial court to be part of the appendix.

Rule 8.224 establishes another procedure for providing exhibits to the reviewing court. Under this rule, within 10 days after the last respondent’s brief is filed or could be filed, a party wanting the reviewing court to consider any original exhibits that were admitted in evidence, refused, or lodged must serve and file a notice in superior court designating such exhibits. Unless the reviewing court orders otherwise, the superior court clerk must then put the original exhibits in order and send them, along with a list of the exhibits, to the reviewing court. Rule 8.224 does not currently contain a cross-reference to either rule 8.120 or rule 8.124, and neither rule 8.120 nor rule 8.124 contains any cross-reference to rule 8.224. As a result, it may not be clear how these different procedures for providing the reviewing court with exhibits fit together.

The committee recommends amending both rules 8.120 and 8.124 to provide that exhibits are deemed to be part of the “record” rather than part of either the clerk’s transcript or an appendix. In addition, the committee recommends amending rule 8.124(b)(5) to add a reference to exhibits lodged with the trial court, so that, as with the clerk’s transcript under rule 8.120, all exhibits “admitted in evidence, refused, or lodged” would be “deemed” part of the record when an appendix is used in lieu of a clerk’s transcript. Amending rules 8.120 and 8.124 in this way would also bring these rules into conformity with the rules relating to appeals in criminal cases—rules 8.320, 8.610, and 8.634—which provide that exhibits are “deemed part of the record,” rather than part of the clerk’s transcript. Finally, the committee recommends amending rule 8.224 to clarify that the procedure for requesting exhibits at the time of briefing is only available when the exhibits have not already been included in the clerk’s transcript or appendix under rules 8.120 or 8.124.

#### *Reporter’s transcript ordered by the court to augment record*

Rule 8.130 of the California Rules of Court addresses the designation and preparation of reporter’s transcripts for appeals in unlimited civil cases. In general, this rule provides that the appellant must decide whether to designate a reporter’s transcript and must pay for any transcript he or she designates. If the appellant designates a reporter’s transcript, the respondent may designate additional proceedings to be included in that transcript and must pay the cost of those additions. If, however, the appellant decides not to order a reporter’s transcript, rule 8.130(a)(3) currently provides that the respondent cannot

require that a transcript be prepared, but the reviewing court, on its own or the respondent's motion, may order the record augmented under rule 8.155 to prevent a miscarriage of justice. Rule 8.130 does not currently indicate who is responsible for the cost of a court-ordered reporter's transcript under this provision.

Similarly, rule 8.155, which addresses augmentation of the record on appeal, currently provides that, at any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include a certified transcript of oral proceedings not designated under rule 8.130. Like rule 8.130, however, this rule does not address who is responsible for the cost of a court-ordered reporter's transcript under this provision.

The committee recommends amending both these rules to clarify that the appellant, who generally bears the cost of producing the record in civil appeals, is responsible for the cost of any reporter's transcript ordered by the court to augment the record on appeal unless the court orders otherwise.

#### *Reporter's Transcripts in Computer-Readable Format*

Rule 8.130 authorizes a party to request a reporter's transcript in computer-readable form but does not address how such transcripts should be labeled or formatted. Code of Civil Procedure section 271(b) contains requirements for the format, labeling, content, and numbering of such computer-readable transcripts. The committee recommends amending rule 8.130 to clarify that a computer-readable copy of a reporter's transcript must comply with these requirements in Code of Civil Procedure section 271.

#### *Sealed records*

Rule 8.160 establishes the procedures for handling sealed records in a reviewing court. Subdivision (g) of this rule addresses disclosure of sealed records, providing that "[a] record filed publicly in the reviewing court must not disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal." Currently, however, this subdivision is entitled "*References to nonpublic material in public records prohibited*" (emphasis added). The committee recommends changing the title of this subdivision to "*Disclosure of nonpublic material in public records prohibited*" so that it more accurately describes the subdivision's contents.

#### Alternative Actions Considered

In addition to the rule amendments being recommended, the committee also considered recommending revisions to Judicial Council form APP-003, *Notice Designating Record on Appeal—Unlimited Civil Case*, and several possible changes were circulated for public comment this Spring. As discussed below, commentators suggested additional revisions to this form. Committee members concluded that still other aspects of this form could be improved. The committee concluded that it was preferable to prepare a consolidated proposal to make all of the changes to this form at the same time and therefore decided to defer recommending adoption of the revisions that were circulated for public comment.

As indicated below, the committee also made several modifications to its proposal to address the public comments received.

#### Comments From Interested Parties

These proposed amendments were circulated for public comment as part of the Spring 2006 comment cycle. Eleven individuals or organizations submitted comments on this proposal. Seven commentators agreed with the proposal and four agreed with the proposal only if modified. The committee has modified its proposal to address all except one of these comments. The full text of the comments received and the committee's responses is attached on pages 9–15.

As noted above, when this proposal was circulated for public comment, it included proposed revisions to Judicial Council form APP-003, *Notice Designating Record on Appeal—Unlimited Civil Case*. Two commentators—Mr. Joseph Lane, Clerk Administrator of the First Appellate District, and the California Appellate Court Clerks Association—suggested additional changes to this form. The committee agreed with these suggestions but, as discussed above, decided to defer action on these changes pending the development of a more complete proposal for revisions to this form.

Three commentators—the State Bar of California's Committee on Appellate Courts, the Orange County Bar Association, and the Appellate Court Committee of the San Diego County Bar Association—either recommended or agreed that rules 8.120 and 8.124 should be amended to clarify that exhibits are deemed part of the *record*, not part of the clerk's transcript or the appendix. The committee has incorporated this suggestion into its proposal.

Mr. Mike Roddy, Executive Officer of the Superior Court of San Diego County, submitted a comment pointing out an important concern relating to the ensuring the accuracy of exhibits that are returned to a party in the trial court. However, addressing the handling of exhibits in the trial court is outside the charge of the Appellate Advisory Committee. The committee recommends that this suggestion be forwarded to the Civil and Small Claims and Criminal Law Advisory Committees.

#### Implementation Requirements and Costs

The clarification of these rules should eliminate uncertainty and thereby reduce costs.

Attachments

Rules 8.120, 8.124, 8.130, 8.155, 8.160, and 8.224 of the California Rules of Court are amended, effective January 1, 2007, to read:<sup>2</sup>

1 **Rule 8.120. Clerk’s transcript**

2  
3 **(a) Notice of designation**

4  
5 (1)-(4) \*\*\*

6  
7 (5) Except as provided in (b)(4), all exhibits admitted in evidence, refused, or  
8 lodged are deemed part of the ~~clerk’s transcript~~ record, but a party wanting a  
9 copy of an exhibit copied included in the transcript must specify that exhibit  
10 by number or letter in its notice of designation. If the superior court has  
11 returned a designated exhibit to a party, the party in possession of the exhibit  
12 must promptly deliver it to the superior court clerk.

13  
14 **(b)-(d) \*\*\***

15  
16  
17 **Rule 8.124. Appendixes instead of clerk’s transcript**

18  
19 **(a) \*\*\***

20  
21 **(b) Contents of appendix**

22  
23 (1)-(4) \*\*\*

24  
25 (5) All exhibits admitted in evidence, ~~or refused,~~ or lodged are deemed part of the  
26 ~~appendix~~ record, whether or not ~~it~~ the appendix contains copies of them.

27  
28 (6)-(7) \*\*\*

29  
30 **(c)-(g) \*\*\***

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<sup>2</sup> These recommended amendments have been made to the version of this rule adopted by the Judicial Council at its June 30, 2006, business meeting and reflect the text that will be in effect on January 1, 2007. Any amendments adopted as part of this proposal will be incorporated into the text of the rule that goes into effect on January 1, 2007.

1 **Rule 8.130. Reporter’s transcript**

2  
3 **(a) Notice**

4  
5 (1)–(2) \*\*\*

6  
7 (3) If the appellant elects to proceed without a reporter’s transcript, the  
8 respondent cannot require that a reporter’s transcript be prepared. But  
9 the reviewing court, on its own or the respondent’s motion, may order  
10 the record augmented under rule 8.155 to prevent a miscarriage of  
11 justice. Unless the court orders otherwise, the appellant is responsible  
12 for the cost of any reporter’s transcript the court may order under this  
13 subdivision.

14  
15 (4)–(6) \*\*\*

16  
17 **(b)–(e) \*\*\***

18  
19 **(f) Filing the transcript; copies; payment**

20  
21 (1)–(3) \*\*\*

22  
23 (4) On request, and unless the superior court orders otherwise, the reporter  
24 must provide any party with a copy of the reporter’s transcript in  
25 computer-readable format. Each computer-readable copy must comply  
26 with the format, labeling, content, and numbering requirements of Code  
27 of Civil Procedure section 271(b).

28  
29  
30 **Rule 8.155. Augmenting and correcting the record**

31  
32 **(a) Augmentation**

33  
34 (1) At any time, on motion of a party or its own motion, the reviewing  
35 court may order the record augmented to include:

36  
37 (A) Any document filed or lodged in the case in superior court; or

38  
39 (B) A certified transcript—or agreed or settled statement—of oral  
40 proceedings not designated under rule 8.130. Unless the court  
41 orders otherwise, the appellant is responsible for the cost of any  
42 additional transcript the court may order under this subdivision.

1 (2)–(3) \*\*\*

2

3 (b)–(d) \*\*\*

4

5

6 **Rule 8.160. Sealed records**

7

8 (a)–(f) \*\*\*

9

10 (g) **References to Disclosure of nonpublic material in public records**  
11 **prohibited**

12

13 A record filed publicly in the reviewing court must not disclose material  
14 contained in a record that is sealed, lodged conditionally under seal, or  
15 otherwise subject to a pending motion to file under seal.

16

17

18 **Rule 8.224. Transmitting exhibits**

19

20 (a) **Notice of designation**

21

22 (1) Within 10 days after the last respondent’s brief is filed or could be filed  
23 under rule 8.220, a party wanting the reviewing court to consider any  
24 original exhibits that were admitted in evidence, refused, or lodged but  
25 that were not copied in the clerk’s transcript under rule 8.120 or the  
26 appendix under rule 8.124 must serve and file a notice in superior court  
27 designating such exhibits.

28

29 (2)–(3) \*\*\*

30

31 (b)–(d) \*\*\*

32

**SPR06-06**

**Appellate Procedure: Record on Appeal in Unlimited Civil Cases  
(amend Cal. Rules of Court, rules 8.120 [formerly rule 4], 8.124 [formerly rule 5.1], 8.155 [formerly rule 12],  
8.160 [formerly rule 12.5], and 8.224 [formerly rule 18]; revise form APP-003)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Saul Bercovitch State Bar of California Committee on Appellate Courts 180 Howard Street San Francisco, CA 94105-1639	A	Y	<p>The proposed amendments to rule 8.130(a)(3) (formerly rule 4) resolve a present ambiguity about who is responsible for covering the cost of a transcript ordered by the Court of Appeal under rule 12 (new rule 8.155). Because appellants must generally bear the cost of producing the record in civil appeals, and any transcript ordered by the court is presumably critical to the appeal, it seems appropriate to require the appellant to pay for it. Indeed, any rule 12 (new rule 8.155) transcript should probably have been ordered by the appellant in the first place.</p> <p>The Committee supports the proposed amendments to rule 8.124(b)(5) (formerly rule 5.1)—to provide that exhibits “lodged” in the trial court are deemed part of the appendix—for the reasons stated in the Appellate Advisory Committee discussion.</p> <p>The proposed amendments to rule 8.224 (formerly rule 18) likewise make sense. Without a cross-reference to rules 8.120 and 8.124 (formerly rules 5 and 5.1, respectively), parties may believe they are obligated to designate original exhibits for transmittal even if they have already designated them for the clerk’s transcript or included them in the appendix. Indeed, in the absence of clarification, that is</p>	<p>No response needed.</p> <p>No response needed.</p> <p>No response needed.</p>

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8.160 [formerly rule 12.5], and 8.224 [formerly rule 18]; revise form APP-003)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>probably the most prudent approach.</p> <p>In response to the Appellate Advisory Committee’s specific request for comments, the Committee believes that the language in rules 8.120 and 8.124 (formerly rules 5 and 5.1, respectively) should be amended to state that exhibits are deemed part of the “record” rather than the clerk’s transcript or an appendix. The current language in the rules may confuse parties about whether exhibits are automatically part of the clerk’s transcript or appendix, or whether they must be designated before they will be included. Such confusion could have serious consequences, since parties may be barred from relying upon exhibits left out of the clerk’s transcript or appendix (and not transmitted under rule 8.224 [formerly rule 18]). This may not be obvious to some practitioners, especially those accustomed to litigating in the Ninth Circuit. There, the district court record is always available to the Court of Appeals, and law clerks can, and often do, order the entire record above and beyond the excerpts filed by the parties.</p>	<p>The committee has modified its proposal to include amendments to rules 8.120 and 8.124 (formerly rules 5 and 5.1, respectively) to provide that exhibits are deemed part of the “record” rather than part of the clerk’s transcript or appendix.</p>

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
2.	Justice Roger W. Boren Administrative Presiding Justice Second Appellate District 300 South Spring Street Los Angeles, CA 90013	A	N	No specific comment.	No response needed.
3.	Ms. Deena Fawcett President California Appellate Court Clerks Association Court of Appeal, Third Appellate Dist. 900 N Street, Room 400 Sacramento, CA 95814-4869	AM	Y	Page 13 (form) <b>Notice Designating Record on Appeal (Unlimited Civil Case):</b>  At the bottom of page 13, the statement regarding the reporter's transcript in computer-readable format should be placed at the top of the page instead of the bottom of the page. For example, if a party indicates only one reporter's name, it is very unlikely that a party will notice this statement at the very bottom of the page.	The committee agreed with these suggestions but has deferred recommending these changes pending preparation of a proposal for more comprehensive changes to this form.
4.	Ms. Janet Garcia Manager, Planning & Research Unit Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012	A	Y	No specific comment.	No response needed.
5.	Ms. Cheryl Kanatzar Deputy Executive Officer Ventura County Superior Court 800 South Victoria Avenue Ventura, CA 93009	A	Y	No specific comment.	No response needed.

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
6.	Mr. Joseph Lane Clerk Adminsitrator Secord District Court of Appeal Los Angeles	AM	N	<p>As to the proposed changes in [form] APP-003: The proposal is to add two boxes to allow for the designation of the use of the superior court file. However, only the First, Third and Fourth Districts allow the use of the superior court so why not note in new sections 5 and 6 that these are for use only in 1, 3 and 4<sup>th</sup> districts. This will eliminate a lot of confusion and unnecessary calls to the courts. I am sure that if the other Districts (i.e., 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup>) ever decide to allow their use, they will be more than willing to wait 12 months for this form to be modified before beginning the practice. And the likelihood that they will ever allow their use is remote at best.</p> <p>Lastly, the box indicating that the party desires an electronic copy of the reporter's transcript should be at the top of the form, rather than at the bottom. It will be easily overlooked if it is not at the top.</p>	The committee agreed with these suggestions but has deferred recommending these changes pending preparation of a proposal for more comprehensive changes to this form.
7.	Mr. Wayne Maire President California Defense Counsel 925 L Street, Suite 1250 Sacramento, CA 95814	A	Y	No specific comment.	No response needed.

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
8.	Ms. Julie M. McCoy President, Orange County Bar Ass'n. P.O. Box 17777 Irvine, CA 92623-7777	AM	Y	<p>The OCBA Administration of Justice Committee recommends that rules 8.120(a)(5) and 8.124(b)(5) (formerly rules 5 and 5.1, respectively) be amended to provide that exhibits admitted in evidence, refused, or lodged are deemed to be part of the “record” rather than deemed to be part of either the “clerk’s transcript” or an “appendix.” Litigants may find it confusing that exhibits are deemed included in the clerk’s transcript or appendix even though they do not actually appear in these documents unless a litigant chooses to include them.</p> <p>Recommend that rule 8.120(a)(5) (formerly rule 5) be amended to read: “Except as provided in (b)(4), all exhibits admitted in evidence, refused, or lodged are deemed part of the <u>record</u>, and a party wanting an exhibit copied in the <u>clerk’s</u> transcript must specify that exhibit by number or letter in its notice of designation. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must promptly deliver it to the superior court clerk.”</p>	Agree; suggested change has been incorporated into proposal.

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
9.	Ms. Pam Moraida Civil/Small Claims Program Manager Solano County Superior Court 600 Union Avenue Fairfield, CA 94533-5000	A	N	No specific comment.	No response needed.
10.	Mr. Mike Roddy Executive Officer San Diego County Superior Court 220 West Broadway San Diego, CA 92101	AM	Y	The rules allow lodged documents to be included in the clerk’s transcript at a party’s request. Lodged documents present a special problem because they are not maintained in the court file and could be subject to augmentation/alteration. The trial court should attempt to ensure that the lodged document is accurate by requiring, for example, that all lodged documents have Bates stamp numbers.	This comment points out an important issue relating to the handling of exhibits in the trial court. However, the handling of exhibits in the trial court is outside the charge of the committee. The committee recommends that this suggestion be forwarded to the Civil and Small Claims and Criminal Law Advisory Committees.
11.	Ms. Carmela F. Simoncini Chair, Appellate Court Committee of the San Diego County Bar Association Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101	A	Y	We support the proposed revisions to rules 8.130, 8.120, 8.124, 8.155, 8.160, and 8.224 (formerly rules 4, 5.1, 12, 12.5, and 18, respectively). The proposed revision to the judicial council form (APP-003) is also helpful.  In response to the request for specific comment, we agree that rules 8.120 and 8.124 (formerly rules 5 and 5.1, respectively) should be amended to provide that exhibits are deemed part of the “record” rather than either the clerk’s transcript or appendix. This revision should	No response needed.  The committee has modified its proposal to include amendments to rules 8.120 and 8.124 (formerly rules 5 and 5.1, respectively) to provide that exhibits are deemed part of the “record” rather than part

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				eliminate confusion about the fact that the exhibits need not actually appear [in the] clerk's transcript or the appendix to be part of the record on appeal.	of the clerk's transcript or appendix.